



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 22, 2004

Ms. Martha McCabe
Assistant Director of General Law
Public Utilities Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2004-9937

Dear Ms. McCabe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 213357.

The Public Utilities Commission (the "commission") received two requests from the same requestor for 1) nineteen audited financial statements, three financial and statistical reports, one annual report, and one set of financial statements, filed with the commission's central records division by twenty-two utilities and 2) the earnings monitoring reports filed by eighteen utilities, and the affiliate transaction reports filed by thirty-three named utilities.¹ You claim that the requested information may be confidential under section 552.110 of the Government Code, but make no arguments and take no position as to whether the information is so excepted from disclosure. Instead, pursuant to section 552.305, you have notified the interested third parties of the requests and of their opportunity to submit

¹ On September 23, 2004, this office received a request for a ruling from you pertaining to the second request from Mr. Smith. We originally assigned ID# 213661 to your September 23 request. However, because both requests seek much of the same information, we are combining ID# 213661 with this ruling and addressing both of Mr. Smith's requests here.

comments to this office.² See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that you have submitted information that is not responsive to the request. In this instance, you have submitted the earnings monitoring report of Livingston. However, neither request seeks the earnings monitoring report of Livingston. Therefore, this report, which we have marked, is not responsive to either request. This ruling does not address the non-responsive document.

Next, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). However, as of the date of this letter, we have not received arguments for withholding the requested information from Kerrville or Valor. Therefore, we have no basis to conclude that the release of any of the submitted information would harm the proprietary interests of these interested third parties. See, e.g., Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie*

² The commission notified: Eastex Telephone Coop., Inc. ("Eastex"); Cumby Telephone Coop., Inc. ("Cumby"); West Texas Rural Telephone Coop., Inc. ("West Texas"); Alenco Communications ("Alenco"); Lipan Telephone Company ("Lipan"); Livingston Telephone Company ("Livingston"); Brazos Telephone Coop., Inc. ("Brazos"); Santa Rosa Telephone Coop., Inc. ("Santa Rosa"); Valley Telephone Coop., Inc. ("Valley"); Colorado Valley Telephone Coop., Inc. ("Colorado"); Etex Telephone Coop., Inc. ("Etex"); Industry Telephone Company ("Industry"); Brazos Telecommunications, Inc. ("Brazos Telecommunications"); Riviera Telephone Company ("Riviera"); North Texas Telephone Company ("North Texas"); Central Texas Telephone Coop., Inc. ("Central"); Community Telephone Company ("Community"); XIT Rural Telephone Coop., Inc. ("XIT"); Electra Telephone Coop., Inc. ("Electra"); Coleman County Telephone Cooperative ("Coleman"); West-Tex Telephone Cooperative ("West-Tex"); Comanche County Telephone Company ("Comanche"); Border to Border Communications ("Border"); Kerrville Telephone Company ("Kerrville"); Blossom Telephone Company ("Blossom"); Tatum Telephone Company ("Tatum"); Cap Rock Telephone Cooperative ("Cap Rock"); Mid-Plains Rural Telephone Cooperative ("Mid-Plains"); Nortex Communications ("Nortex"); Guadalupe Valley Telephone Cooperative ("Guadalupe"); Southwest Texas Telephone Company ("Southwest"); Big Bend Telephone Co., Inc. ("Big Bend"); West Plains Telecommunications ("West Plains"); Valor Telecommunications of Texas, L.P. ("Valor"); and Five Area Telephone Cooperative, Inc. ("Five Area").

case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the commission may not withhold any portion of the submitted information on the basis of any proprietary interest that either Kerrville or Valor may have in the information.

Eastex, Santa Rosa, Cumby, Valley, West Texas, Colorado, Alenco, Etex, Lipan, Industry, Livingston, Brazos, Riviera, North Texas, Comanche, Central, Colorado, Border, Community, XIT, Electra, Tatum, Coleman, Brazos Telecommunications, Cap Rock, West-Tex, Mid-Plains, Cameron, Nortex, Big Bend, Guadalupe, Five Area, West Plains, Southwest, and Blossom each contend that their information is excepted from disclosure pursuant to section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). An interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Having reviewed the submitted briefs, we conclude that the financial statements and statistical reports that the following third parties seek to withhold are excepted from disclosure under section 552.110(b): Eastex, Santa Rosa, Cumby, Valley, West Texas, Colorado, Alenco, Etex, Lipan, Industry, Livingston, Brazos, Brazos Telecommunications, Riviera, North Texas, Comanche, Central Texas, Colorado, Border, Community, and XIT. We also find that the earnings monitoring reports that the following third parties seek to withhold are excepted from disclosure under section 552.110(b): Blossom, Border, Industry, Comanche, North Texas, Riviera, Community, Cumby, Alenco, Brazos, Brazos Telecommunications, Central, Santa Rosa, Lipan, Valley, Eastex, Etex, and Colorado. Finally, we conclude that the affiliate transaction reports of the following thirds parties are also excepted from disclosure under section 552.110(b): Colorado, Electra, Tatum, Central, Comanche, Coleman, Community, Cumby, Lipan, Livingston, Riviera, Brazos, Etex, Industry, North Texas, Brazos Telecommunications, Eastex, Border, Community, Valley, Santa Rosa, Alenco, Coleman, Cap Rock, West-Tex, Mid-Plains, Cameron, Nortex, Big Bend, Guadalupe, Five Area, West Plains, West Texas, XIT, and Southwest.³ The remaining submitted information must be released to the requestor.

³ As our ruling is dispositive, we do not address the remaining arguments submitted by the third parties.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 213357

Enc. Submitted documents

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